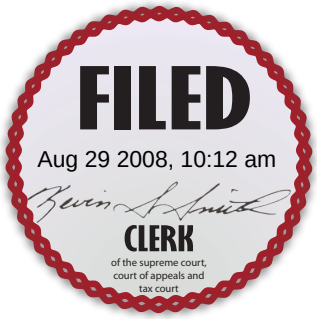

ATTORNEY FOR APPELLANT:

MATTHEW JON MCGOVERN
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KAIL FORTSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-0801-CR-16
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable David D. Kiely, Magistrate
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0703-FD-303

August 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Kail Fortson appeals his conviction for receiving stolen property[1] as a Class D felony contending that the evidence presented was insufficient to support an inference that Fortson knew the truck he was driving was stolen.

We reverse.

FACTS AND PROCEDURAL HISTORY

On the afternoon of March 13, 2007, Nathan Sosh ran errands in his 1993 Chevy S-10 truck. After being in a store for thirty to forty-five minutes, he returned to the parking lot to discover his truck missing. Sosh reported the vehicle stolen to the police. Later that evening, police officers observed a truck matching the description and license plate number of Sosh's vehicle exiting a parking lot. After stopping the vehicle, the officers found two men in the truck, and Fortson was driving. Fortson yelled and complained when he was arrested. He repeatedly told police that he had borrowed the truck and that he did not steal it. The State charged Fortson with receiving stolen property as a Class D felony. At trial, Sosh testified that he had never met Fortson and had not given anyone permission to drive his vehicle. Fortson was convicted and now appeals.

DISCUSSION AND DECISION

Fortson argues that there is insufficient evidence to support his conviction. When reviewing the sufficiency of the evidence, this court cannot reweigh the evidence or judge the credibility of witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). Appellate courts must affirm a conviction if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find a defendant guilty

[1] *See* IC 35-43-4-2(b).

beyond a reasonable doubt. *Tobar v. State*, 749 N.E.2d 109, 111-12 (Ind. 2000).

A person is guilty of receiving stolen property when that person "knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft." IC 35-43-4-2(b). Here, Fortson asserts that the State failed to prove that he knew the truck was stolen. *Appellant's Br.* at 5. Evidence that merely raises a suspicion that the defendant had knowledge that the property is stolen is not sufficient. *Mattingly v. State*, 421 N.E.2d 18, 19 (Ind. Ct. App. 1981). A defendant's knowledge may be proven by the facts and circumstances surrounding his possession of stolen property. *Barnett v. State*, 834 N.E.2d 169, 172 (Ind. Ct. App. 2005). Knowledge may not be inferred solely from the unexplained possession of recently stolen property. *Id*. However, a combination of circumstances, such as possession of recently stolen property, an unusual manner of acquisition, and providing evasive answers may be sufficient to prove knowledge of the stolen nature of the property. *Id*. When reviewing a case that relies on circumstantial evidence, the appellate court asks whether reasonable minds could reach the inference drawn by the jury. *Gibson v. State*, 643 N.E.2d 885, 888 (Ind. 1994); *Kizer v. State*, 437 N.E.2d 466, 467 (Ind. 1982).

In *Gibson*, our Supreme Court found it convincing that Gibson possessed the stolen property; lied to police about possession; and that he went to considerable lengths to conceal the property, including physical resistance. *Gibson*, 643 N.E.2d at 888. Other courts have relied on similar circumstances to support an inference of knowledge of the stolen nature of the property. See *Butcher v. State*, 597 N.E.2d 357, 359 (Ind. Ct. App. 1992), *trans. denied* (knowledge may be inferred from possession together with lying about cashing in coins and

changing explanation about how coins were acquired); *Griffin v. State* 175 Ind. App. 469, 476, 372 N.E.2d 497, 502 (Ind. Ct. App. 1978) (knowledge may be inferred from possession together with evasive answers at time of arrest and lying about manner of acquisition); *Driver v. State*, 725 N.E.2d 465,470-71 (Ind. Ct. App. 2000) (knowledge may be inferred from recent possession of stolen license plate and evasive answers regarding ownership of vehicle found with stolen license plates).

Here, Fortson was arrested within seven to eight hours after the truck was stolen. *Tr*. at 20, 28. Sosh testified that he had never met Fortson and had never given him permission to use his truck. *Id*. at 22-23. During his arrest, Fortson insisted that he was innocent and had only borrowed the truck. *Id*. at 47, 56. Fortson did not identify from whom he borrowed the truck. *Id*. One of the arresting officers testified that Fortson's uncooperative conduct during interrogation ended questioning. *Id*. at 42.

In support of his position that he did not know the truck was stolen, Fortson argues that he did not attempt to conceal the truck and that he was not driving erratically or attempting to evade police at the time he was pulled over. *Appellant's Br*. at 6. He also argues that the truck revealed no evidence of having previously been stolen such as broken windows or a broken steering column. *Id*. at 8. Fortson also did not physically resist officers. *Tr*. at 49.

Fortson also maintains that he did not provide evasive answers to the police officers' questions. In support of that argument, he contends that protesting his innocence, by claiming he didn't steal the truck and that he borrowed it, cannot be construed as evasive

answers. *Appellant's Br*. at 6-7. Furthermore, he accurately provided his identifying information when asked. *Id*.

The State contends that because Fortson was belligerent and obnoxious when speaking to the officers, questioning could not continue and that he failed to identify from whom he borrowed the truck. *Appellee's Br*. at 4. We are not convinced that maintaining one's innocence can be construed as answering evasively. Furthermore, in light of a defendant's right to silence and privilege against self-incrimination, we also are not convinced that refusing to identify the person from whom the car was borrowed can be construed as an evasive answer.[2]

The facts of this case are not analogous to those in *Driver v. State*, 725 N.E.2d 465 (Ind. Ct. App. 2000). That case involved a stolen license plate, which the defendant claimed he received from a person named "Matt." The defendant, however, refused to provide any other details about Matt. The *Driver* court ruled that the evidence was sufficient to support his conviction for receiving stolen property because the defendant lied about who owned the car that police stopped. *Id.* at 470-71. The defendant said that the passenger in the car was the owner and then later admitted he was the owner. *Id*. Although *Driver* also involved a defendant who refused to supply information about the provider of the stolen property, the defendant in *Driver* also gave overtly evasive answers by lying about who owned the car police stopped. Here, the State failed to prove that Fortson lied about his acquisition of the truck or that he gave police evasive answers.

We believe that the circumstances in the present case do not support a reasonable inference that Fortson had knowledge that the property was stolen. Although Fortson was found to be in possession of recently stolen property, the State failed to provide any other facts to support an inference of knowledge.[3] There is no evidence that Fortson attempted to conceal the truck from officers, physically resist officers, flee, or that he provided evasive answers. Additionally, the absence of any telltale signs of theft, such as a broken steering column or broken windows, supports the inference that Fortson was unaware the truck was stolen. Therefore, because the State could only prove that he was in possession of recently stolen property, that fact alone cannot support the inference that Fortson knew the truck was stolen. We therefore conclude that insufficient evidence was presented to support Fortson's conviction for receiving stolen property.

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[2] Precedent shows that evasive answers require some proof of dishonesty or intent to be misleading. *See Butcher v. State*, 597 N.E.2d 357, 359 (Ind. Ct. App. 1992) (lying about cashing coins and changing explanations of acquisition of coins).

[3] We note that had the State charged Fortson with theft we would be faced with an anomalous result where the mere unexplained possession of recently stolen property is sufficient to support an inference of theft of that property. *See J.B. v. State*, 748 N.E.2d 914, 917-18 (Ind. Ct. App. 2001). The *J.B.* court stated, and we agree, that until our Supreme Court instructs otherwise, the unexplained possession of recently stolen property may be sufficient to support a conviction for theft; however if the State charges receiving stolen property, the unexplained possession of recently stolen property must be accompanied with additional circumstances supporting an inference that the accused knew the property was stolen. *Id.* at 918. We agree with *J.B.* that the "disparate application of this inference may well lead to anomalous results" and join with them in urging our Supreme Court to clarify this anomaly. *Id*. at 919 n.4.

Reversed.

CRONE, J., concurs.

VAIDIK, J., dissents with separate opinion.

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KAIL FORTSON,	)	
	)	
Appellant-Defendant,	)	
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vs.	)	No. 82A04-0801-CR-16
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

VAIDIK, Judge, dissenting

I respectfully dissent from the majority's conclusion that the evidence is insufficient to support Fortson's conviction for receiving stolen property. Because Fortson was found in possession of a truck approximately two miles from where it had been stolen seven hours earlier and told the police that he borrowed the truck, which is an explanation that the jury rejected, I would affirm his conviction for receiving stolen property. Specifically, I disagree that there are two standards of proof for the crimes of theft and receiving stolen property. In light of the substantial overlap between these crimes and because it does not make any difference whether the State charges the actual thief of the property with theft or receiving

stolen property, I believe that the same evidence is needed to prove a defendant guilty of either crime.

Admittedly, in 1925, the Indiana Supreme Court said there is a difference in proof between the crimes of theft and receiving stolen property:

> The rule that the possession of stolen property, the proceeds of a larceny soon after the commission of the offense, unless explained, is prima facie evidence of the guilt of the person in whose possession the property is found, does not apply to the offense of receiving stolen property.

Bowers v. State, 196 Ind. 4, 146 N.E. 818, 819 (1925). However, this came some seventy years before our Supreme Court addressed the substantial overlap between theft and receiving stolen property in *Gibson v. State*, 643 N.E.2d 885 (Ind. 1994). Before *Gibson*, there was a disagreement within the Court of Appeals as to whether a person could be convicted of receiving stolen property if that person was the actual thief. Our Supreme Court clarified in *Gibson* that when the legislature reorganized Indiana Code § 35-43-4-2 in 1979, it intended to authorize the State to charge either theft or receiving stolen property, whichever it seemed most likely that the accused committed. *Id.* at 891-92. As such, the Court held that an accused could be convicted of receiving stolen property, even if the actual thief, so long as the State met its burden of proof in all respects. *Id.* at 892. Since *Gibson*, there has been a noticeable shift in how we have been handling our theft and receiving stolen property cases. *See, e.g.*, *Purifoy v. State*, 821 N.E.2d 409, 413-14 (Ind. Ct. App. 2005) ("Thus, although the State did not allege that Purifoy was the actual thief in this case, it was permissible to charge him with theft rather than receiving stolen property. It will be helpful to analyze the

"knowledge" requirement in this theft case by referring to receiving stolen property cases; the context is the same in either scenario."), *trans. denied*.

In order to determine whether the defendant knows that the property is stolen in both theft and receiving stolen property cases, we must look to the circumstances surrounding the defendant's possession of the property. *Gibson*, 643 N.E.2d at 888; *Purifoy*, 821 N.E.2d at 414. Because knowledge is the mental state of the actor and we cannot look into the defendant's mind to determine whether he knows that the property is stolen, we must look to the totality of the circumstances. *Wilson v. State*, 835 N.E.2d 1044, 1049 (Ind. Ct. App. 2005), *trans. denied*. Proof of knowledge entails more than mere possession of the property. Many Indiana cases have talked about some of these additional circumstances, but this is a non-exhaustive list, as we are to look to the totality of the circumstances. Some of these additional circumstances include attempts at concealment, evasive or false statements, and an unusual manner of acquisition. *Gibson*, 643 N.E.2d at 888; *Purifoy*, 821 N.E.2d at 414. Also relevant are the passage of time between the taking of the property and the time the defendant is found to be in possession of the property (commonly referred to as recently stolen property) as well as the proximity in location to where the property was taken to where it was found. *See Miller v. State*, 563 N.E.2d 578, 581 (Ind. 1990) (recently stolen property), *reh'g denied*. Unlike the majority, I believe that this non-exhaustive list of circumstances should be used to prove whether a defendant is guilty of either theft or receiving stolen property and that there are not two separate standards of proof.

Turning to the facts of this case, the record shows that around 4:30 p.m. on March 13, 2007, Sosh left the keys in his truck and went inside the Big Lots on Diamond Avenue in

Evansville, Indiana.[4] When he exited the store thirty to forty-five minutes later, his truck was gone. He then reported his truck stolen. Around 11:30 p.m. that same night, Officer Jeremy Matthews from the Evansville Police Department saw Fortson in Sosh's truck pull out of the Esquire Motel onto Fares Avenue, which was approximately two miles from the Big Lots, and pulled him over four blocks later. Tr. p. 27-28, 83. During the stop, Fortson complained that it was a racially motivated stop and yelled that he did not steal the truck. *Id.* at 42, 50. Officer Matthews explained that once Fortson was in custody, "he was very belligerent, wasn't very cooperative at all to the point that I didn't even continue any further questioning." *Id.* According to another officer on the scene, Officer Nicholas Henderson, Fortson said "he didn't steal [the truck], and I can't remember if he said he borrowed it or if it was loaned to him, but it was, you know, . . . something like that." *Id.* at 57. The officers, however, did not ask Fortson from whom he borrowed or loaned the truck.

In sum, Fortson was found in possession of a truck pulling out of a motel parking lot approximately two miles from where it was stolen seven hours earlier. Fortson, who complained that the stop was racially motivated, maintained that he did not steal the truck and was very uncooperative and belligerent toward the officers. The jury heard Fortson's explanation for why he was in possession of the stolen truck through both officers' trial testimony and rejected it. Given the totality of the circumstances, I would affirm the jury's verdict finding Fortson guilty of receiving stolen property.

[4] Sosh testified that he got off work at 4:00 p.m. and went home, let his dog out, and ran a couple of errands before going to Big Lots.